

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

VIRGINIA M. BUNCH,

Plaintiff,

v.

SHARON BUSH ELLISON,

Defendant.

*
*
*
*
*
*
*
*
*
*
*

CV 116-163

O R D E R

Defendant removed this action to this Court on September 28, 2016. (Doc. 1.) On October 7, 2016, the Magistrate Judge reported and recommended that the Court remand this matter to the state court. (Doc. 8.) The Court adopted that recommendation on October 25, 2016, and remanded this case to Richmond County Magistrate Court. (Doc. 11.) Defendant has since filed a notice of appeal, and she requests that the Court stay enforcement of its order remanding this case pending the resolution of her appeal. Because a stay is not justified, the Court **DENIES** Defendant's motion (doc. 16).

Defendant has also filed a motion to proceed IFP. (Doc. 15.) Although her motion requests leave to proceed IFP in this

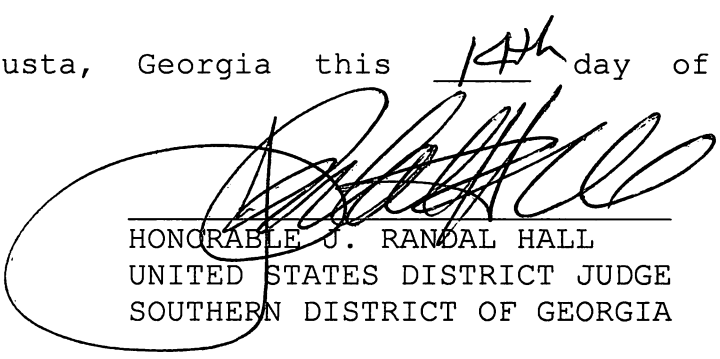
Court, the Court will construe it as a motion for leave to appeal IFP.

The district court must grant leave to appeal IFP unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant. Ellis v. United States, 356 U.S. 674, 675 (1958). The Eleventh Circuit defines a frivolous appeal under § 1915 as being one without arguable merit. Sun v. Forrester, 939 F.2d 924, 925 (11th Cir. 1991). The application may be denied if it objectively appears that the appeal cannot succeed as a matter of law. DeSantis v. United Techs. Corp., 15 F. Supp. 2d 1285, 1289 (M.D. Fla. 1998).

Here, it is clear that Defendant's appeal lacks any arguable merit. First, as the Magistrate Judge's report and recommendation states, it is well-settled law that a defendant may not create federal-question jurisdiction by asserting a counterclaim or defense based on a federal statute, which Defendant attempted to do in this case. See Vaden v. Discover Bank, 556 U.S. 49, 59-61 (2009). Furthermore, the Court's Order in this case is not appealable because "[a]n order remanding a case to the State from which it was removed is not reviewable on appeal or otherwise," except under limited circumstances, which are not applicable here. See 28 U.S.C. § 1447(d); Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-28 (1995) ("As long as a district court's remand is based on a timely raised

defect in removal procedure or on lack of subject-matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)."). Accordingly, Defendant's motion to proceed IFP (doc. 15) is **DENIED.**

ORDER ENTERED at Augusta, Georgia this 14th day of November, 2016.



HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA